In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 474

PAN AMERICAN WORLD AIRWAYS, INC., AND THE TRAVELERS INSURANCE CO., PETITIONERS

v.

STEPHEN O'HEARNE, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, FIFTH COMPENSATION DISTRICT, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE DEPUTY COMMISSIONER

The court below affirmed the deputy commissioner's finding that the death of a defense base employee, while he was engaged in recreational activity, arose out of and in the course of his employment, within the meaning of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424, as amended, 33 U.S.C. 901, *et seq.*) as extended by the

Defense Bases Act (56 Stat. 1035, as amended, 42 U.S.C. 1651, *et seq.*). The claim for death benefits in this case arose out of the very same "jeep" accident as the claim for death benefits in *United States* v. *Pan American World Airways*, 299 F. 2d 74, certiorari denied, 370 U.S. 918, in which the Fifth Circuit rejected the deputy commissioner's finding that the employee's death arose out of and in the course of his employment.

We believe that the instant case and the Fifth Circuit's *Pan-American* decision, *supra*, reflect a conflict of approach in determining whether an injury to an overseas defense base employee arose out of and in the course of his employment. The Ninth Circuit, like the court below, has adopted the more liberal view. See *Self* v. *Hanson*, 305 F. 2d 699 and *Hastorf-Nettles, Inc.* v. *Pillsbury*, 203 F. 2d 641. The Fifth Circuit adheres to the position which it enunciated in its *Pan-American* decision. See *O'Keeffe* v. *Smith, Hinchman & Grylls Associates, Inc.*, 327 F. 2d 1003, in which the government has recently filed a petition for a writ of certiorari (No. 307, this Term).[1]

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[1] In the supplement to our petition for certiorari in the *Smith, Hinchman* case, we pointed out that the decision of the Fifth Circuit in that case is in clear conflict with the decision of the Fourth Circuit in the present case.

Although we believe that the decision below is correct, we agree with petitioner, for the reasons elaborated in our petition in No. 307, that the conflict should be resolved. We accordingly acquiesce in a grant of the writ.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

OCTOBER, 1964.